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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MANUEL NOONE, Defendant and Appellant.	B208800 (Los Angeles County Super. Ct. No. VA102909)

APPEAL from a judgment of the Superior Court of Los Angeles County. William J. Birney, Jr., Judge. Affirmed.

Tara Hoveland, under appointment by Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Voet, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Christopher Noone guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)), and found true a great bodily injury enhancement. (Pen. Code, § 12022.7, subd. (a).)[1] On appeal, Noone argues: (1) his state and federal constitutional rights were violated because the prosecution failed to disclose impeachment evidence; (2) the trial court erred in denying his motion for a new trial based on the newly discovered impeachment evidence; and (3) the evidence did not support a great bodily injury enhancement. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

Lauren Holland was the prosecution's primary witness and the victim in the case. Holland first met appellant in June 2007 at a fast food restaurant. The two struck up a conversation and exchanged telephone numbers. They went on a date at the end of June. At some point after their first date, Holland asked appellant for a loan to retrieve her car from a tow yard following a collision. Appellant refused. In July 2007, Holland and appellant went on a second date and the two had sexual relations.

On October 15, 2007, Holland agreed to meet appellant for a date in Whittier. Holland met appellant at around 9:00 p.m. at a pizza restaurant. Over the course of the evening, appellant and Holland went to two other bars and consumed significant amounts of alcohol. When their conversation turned to the presence of African Americans in Whittier, appellant made comments Holland interpreted as displeasure at an increasing number of African Americans in the city. Holland, who is African American, was disappointed at these comments, but said nothing.

In the early morning hours of October 16, appellant drove Holland back to her car which was parked in a lot for the pizza restaurant. They began kissing in appellant's truck and partially disrobed. Appellant asked Holland to have sex, but she declined. Appellant responded, "Oh, come on. I know you niggers like to have sex." Holland, shocked and offended, slapped appellant. Appellant immediately became angry and said,

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[1] All further statutory references are to the Penal Code unless otherwise noted.

"You got to give me some nigger pussy." Holland responded with some "very profane words," and tried to get out of the truck. When she opened the door, appellant grabbed her by the hair and pulled her back into the truck, between the two front seats. Appellant began choking Holland. She flailed and kicked, tried to honk the horn, pushed at appellant's face, and feared she would lose consciousness. Holland pleaded with appellant not to hurt her.

Appellant stopped choking Holland only when someone began throwing bricks at the truck. Appellant released Holland's throat, but kept his arm tightly around her waist, with his head next to her shoulder, and would not let her go. Holland pleaded with appellant to release her, then she bit his ear. Appellant released Holland, who got out and ran to the rear of the truck where appellant kept equipment for his swimming pool maintenance business. Holland took a hollow metallic pole from the back of the truck to defend herself. Appellant grabbed Holland by the hair. He took the pole away and used it to strike Holland's face and ribs, knocking her to the ground. Holland felt she might pass out from the blows. Appellant also repeatedly pushed Holland to the ground. Holland hit the asphalt and bled, while appellant ranted. Holland pleaded with appellant for her keys, purse, and clothing, but appellant refused to give them to her. Holland's pants were in the truck.

When appellant stopped pushing Holland down, she ran to a nearby senior center. A man there called the police. Police Officer Olivia Fisher testified that when she arrived in response to the call, Holland was crying hysterically. Fisher observed Holland had bloody injuries on her hands, elbows, and knees, and a lump on her face. At trial, Fisher's account of what Holland told her immediately after the incident was consistent with Holland's trial testimony. Fisher photographed Holland's injuries, but testified that Holland's face looked more swollen in person than it did in the photographs. Fisher recalled Holland was wearing pants at the time of the interview.

While Holland was speaking with police, she saw appellant drive by. The police stopped him for questioning. Appellant told Officer Fisher he made a sexual advance to Holland, and when she rejected it he responded, "You know, you niggers like to fuck."

Appellant told Fisher he and Holland both grabbed poles from his truck and attacked each other, which he described as "jousting." Appellant did not admit that he hit Holland in the face with the pole, and said he was not sure how Holland got the abrasions on her knees and elbows. Fisher noted appellant's ear was injured, and he had abrasions under both eyes.

Holland declined immediate medical treatment on the night of the incident. However, her kneecap was bruised and the skin was torn. Her toes were torn and bloodied. The palm of her hand was "peeled open," and she also had an abrasion on her upper left arm. A scar was still visible at trial. She sustained a large abrasion on her elbow and eventually discovered the angora fibers from a sweater she had worn the evening of the incident were stuck in the wound. The right side of Holland's face was swollen and bruised.

Two days later, Holland went to the hospital. She informed an emergency room physician, Dr. Mauricio Acevedo, that she was suffering from headaches and jaw pain which affected her ability to eat. She also complained of dizziness and body aches. Dr. Acevedo observed Holland had two black eyes. He further noted Holland had a decreased range of motion in her knee, and abrasions. Dr. Acevedo prescribed Motrin for mild pain as well as Vicodin for severe pain.

At the trial, Holland testified that her face was still swollen in areas. Her vision was impaired for several months after the incident, and was still occasionally hazy at the time of trial. After the incident she suffered headaches and pain in her jaw and knees. Two months before the trial she went to an emergency room because of a blood clot or residual tissue in her face. The cheek area underneath one eye was still numb. She had a mass or bubble in her eye and planned to see an ophthalmologist. A small circular swelling was visible above Holland's right eye. It took three or four months for pain in Holland's rib area to subside.

Defense Evidence

Appellant testified on his own behalf. According to appellant, after he and Holland had gone on two dates, she called him and asked for a loan to get her car out of impound following a car accident. When appellant refused, Holland became upset and told him to "man up," which he understood to mean that she felt it was his responsibility to help her get her car back. For around one week after the conversation, Holland made several telephone calls to appellant, in which she told him to stop calling her, or to stop "having [his] bitches call her."[2] Appellant was not calling Holland. Appellant testified that when the two went on a subsequent date, appellant learned Holland made the calls because she wanted to know if he was seeing other women, and she seemed jealous.

Appellant's version of events on the night of the incident was similar to Holland's, except he described Holland as the aggressor once the encounter turned violent. According to appellant, the two were having a pleasant evening. Holland did not seem offended by anything appellant said until he expressed his desire to have sex, using terms he did not intend to be derogatory. However, according to appellant, once Holland got angry, she did not stop at slapping him, but instead became "excessively violent," "diabolical," and seemed "mentally disturbed." Appellant stated Holland bit both of his ears, punched him, called him names, screamed, performed some kind of karate kick or chop on him, and hit him with a ball of keys, both inside and outside of the truck. Appellant denied choking, hitting, punching, or kicking Holland, or pulling her hair. He was scared, even terrified, and he tried to get Holland out of the truck so he could drive away. He feared Holland had a weapon in her purse, that she was trying to steal his truck, or that she would try to run him over. He took defensive postures to try to avoid her blows.

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[2] On cross-examination, appellant testified that Holland also made such telephone calls to him even before he refused to loan her money.

When Holland took a pole from the back of his truck, appellant asked for it back. Appellant then grabbed another pole because he feared for his life and his property. Appellant told Holland to drop the pole she was holding, but she did not. Instead, Holland "went after" appellant; appellant described what happened as like "jousting." Appellant believed he was in danger so he struck Holland on the face with the pole he held and she fell to the ground. Appellant retrieved the pole Holland had grabbed, put it in his truck, then got in and drove away. He had cuts and bruises under his eye, around his nose, and injuries on his right ear from Holland's bites.

Trial, Motion for New Trial, and Sentencing

A jury found appellant guilty of assault with a deadly weapon (§ 245, subd. (a)) and found true a great bodily injury special allegation (§12022.7, subd. (a)). After the trial, appellant discovered that Holland had suffered a misdemeanor conviction in 2004 in the Ventura Superior Court. In 2004, Holland pled no contest to a charge of making telephone calls with the intent to annoy, in violation of section 653m, subdivision (a).[3] The prosecutor had previously told defense counsel that Holland had a prior arrest but no convictions. Before his sentencing hearing, appellant filed a motion for a new trial. Appellant argued the prosecution should have disclosed the conviction, and had he known of it before trial, he would have used it to impeach Holland, and as a basis to call other witnesses who heard Holland's threatening calls to appellant.[4]

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[3] Section 653m, subdivision (a) provides: "Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith."

[4] Appellant raised several additional grounds in support of the motion, however appellant's arguments on appeal do not concern the other theories raised below.

The prosecution indicated it had followed an established procedure to discover whether Holland had prior convictions—including pulling a Department of Justice rap sheet—but the conviction did not appear on it. The prosecution further argued the conviction was not admissible to impeach Holland because it was not a moral turpitude crime, and disclosure of the conviction would not have caused the results of the proceeding to be different.

The trial court denied appellant's motion for new trial, reasoning: "[G]iven the nature of the rather brutal assault that was involved in this case, I can't concede the jury would have reached any other decision in this case." The court sentenced appellant to a six-year prison term, consisting of the mid-term of three years, and an additional three years for the great bodily injury enhancement. This appeal followed.

DISCUSSION

I. The Prosecution's Failure to Disclose Impeachment Evidence Did Not Cause Reversible Error

Appellant contends the prosecution's failure to disclose Holland's misdemeanor conviction was prejudicial error under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and California law. Appellant further asserts the trial court should have granted his motion for a new trial because of the newly discovered impeachment evidence the prosecutor had not disclosed. We disagree.

A. *Brady* Error and California law

"The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. [Citations.] 'Evidence is "favorable" if it ... helps the defendant or hurts the prosecution, as by impeaching one of [the prosecution's] witnesses.' [Citation.] 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different." ' [Citations.] Such a probability exists when the undisclosed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Citations.]" (*In re Miranda* (2008) 43 Cal.4th 541,

575 (*Miranda*), citing *Kyles v. Whitley* (1995) 514 U.S. 419; *United States v. Bagley* (1985) 473 U.S. 667 (*Bagley*); *Brady, supra,* 373 U.S. 83; *In re Brown* (1998) 17 Cal.4th 873; and *In re Sassounian* (1995) 9 Cal.4th 535 (*Sassounian*).)

Where the defense has requested particular information and the prosecutor provides an incomplete response, " 'the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued'. . . . Accordingly, in determining whether evidence [is] material, 'the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.' [Citation.]" (*In re Steele* (2004) 32 Cal.4th 682, 700-701, quoting *Bagley, supra,* at pp. 682-683.)

Under California law, a violation of the statutory discovery provisions in a criminal case will be a basis for reversal only where it is reasonably probable that the discovery violation affected the trial result. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, disapproved of on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).)

B. There Was No Error under *Brady* or California law

Appellant contends had he been aware of Holland's prior conviction under section 653m, "he would have been able to more effectively impeach Holland during cross-examination, present witnesses on rebuttal, as well as more effectively develop his defense regarding how Holland's prior threatening phone calls to appellant may have been relevant to appellant's claim of self-defense." We determine the evidence of conduct underlying Holland's prior conviction could not reasonably "be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Miranda, supra,* 43 Cal.4th at p. 575.)

1. Self-Defense Theory

At best, Holland's 2004 misdemeanor conduct was only minimally relevant to appellant's self-defense theory. Holland's 2004 misdemeanor conviction was not indicative of past specific acts of physical aggression or physical violence on her part. While evidence of Holland's prior annoying or harassing telephone calls may have

supported appellant's testimony that Holland also made such telephone calls to him, this would not have cast the case in a significantly different light. There was no evidence that Holland's calls to appellant threatened violence.[5] Even though appellant was already armed with and presented evidence of Holland's phone calls to him, he requested that the court eliminate a portion of a jury instruction on self-defense that would have informed the jury: "If you find that Lauren Holland threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." Appellant's counsel indicated there was no evidence to require that portion of the instruction. The prosecutor agreed and the trial court omitted the language.[6] Nor did appellant suggest in his testimony that Holland's telephone calls were at all related to the October 2007 incident; indeed, even after receiving Holland's calls, it was appellant who initiated their final date.

Appellant argues his strategy at trial may have been different had he known of Holland's 2004 misdemeanor conduct; specifically he would have called other witnesses who could testify about the telephone messages Holland left him. However, nothing about the prosecutor's failure to disclose the 2004 conduct prevented him from attempting to develop that theory at trial through the testimony of those witnesses, had the calls Holland made to appellant in fact been a significant factor in his defense. The evidence of Holland's 2004 misdemeanor conviction did not make appellant's

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5 Holland testified on cross-examination that she did not recall whether she left appellant derogatory telephone messages. She denied leaving messages such as "Chris, you are so cheap. What's wrong with you? Why don't you loan me the money. What's wrong? You don't want to contact me." Appellant testified that Holland left him "threatening" messages demanding he stop calling her, or having others call her.

6 The court also suggested, and the parties agreed, that the evidence did not call for the following section of the instruction: "If you find that the defendant knew that [Holland] had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable."

evidence about the calls made to *him* any more relevant than it would have been otherwise with respect to the self-defense theory.

2. Impeachment

The requisite probability that had evidence been disclosed it would have led to a different result is "assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract." (*Sassounian, supra,* 9 Cal.4th at p. 544.) Here, there is no reasonable probability that evidence of Holland's prior misdemeanor would have cast her testimony into significant doubt.

First, as the People argue, it is not obvious that the trial court would have allowed evidence of Holland's 2004 misdemeanor conduct as impeachment. Only misdemeanor conduct demonstrating moral turpitude is admissible to impeach.[7] (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297 (*Wheeler*).) And even when a witness's prior misdemeanor offense involves moral turpitude, a trial court still may exclude such evidence under Evidence Code section 352. As our high court explained in *Wheeler,* "a misdemeanor-or any other conduct not amounting to a felony-is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Ibid,* fn. omitted; *Doolin, supra,* 45 Cal.4th at p. 443.)

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[7] "The California Supreme Court has divided crimes of moral turpitude into two groups. The first group includes crimes in which dishonesty is an element (i.e., fraud, perjury, etc.). The second group includes crimes that indicate a ' "general readiness to do evil," ' from which a readiness to lie can be inferred. [Citation.] Crimes in the latter group are acts of 'baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [Citation.] 'Although the inference is not as compelling in the latter case, "it is undeniable that a witness's moral depravity of any kind has some 'tendency in reason' [citation] to shake one's confidence in his honesty." ' [Citation.]" (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29.)

The People argue violations of section 653m, subdivision (a), do not involve moral turpitude. We have found no case dispositive on this question. However, we need not decide the issue because we conclude that even if admitted, the evidence would not have significantly damaged Holland's credibility on the key issues in the case. The central issue was whether appellant used force against Holland in lawful self-defense. Evidence of Holland's injuries supported her testimony establishing that she, rather than appellant, was the victim in the altercation, and further that appellant used more force than reasonably necessary to defend himself against any attack by Holland. The evidence included Officer Fisher's testimony, and the photographs of Holland and appellant's respective injuries. This corroborative evidence demonstrated that while appellant claimed he mainly tried to avoid Holland's blows and hit her only to protect himself, after the altercation, Holland was bruised and bloodied in several places, had a lump on her face, and developed two black eyes. Holland had bloody scratches or scrapes on her palm, elbows, and knees, which corroborated her statements that appellant pushed her onto the asphalt and repeatedly knocked her down. Some of her scars were still visible at the trial.

In contrast, Fisher testified that appellant had only scratches under his eyes, an injury to his ear, and no other visible injuries. These injuries were minor when compared to appellant's testimony that Holland punched him in the face at least six times, repeatedly hit him very hard with a ball of keys, bit *both* of his ears so hard he thought she would bite them off, and kicked him in the shoulder and chest with a "karate chop or karate kick."

Moreover, the defense presented other evidence which impugned Holland's character and placed her credibility in doubt. She admitted to asking appellant for a loan at the beginning of their brief courtship, and admitted appellant refused her request. She testified she could not recall whether she left derogatory telephone messages for appellant, rather than denying the charge. She testified she and appellant had previously had sexual relations in Turnbull Canyon. Although appellant made several racial comments Holland found negative on the night of the incident, she did not end the date

before his most inflammatory remarks. She admitted both she and appellant drank significant amounts of alcohol on the night of the incident. (See *People v. Dickey* (2005) 35 Cal.4th 884, 908-909.)

Even had appellant been able to attack Holland's credibility with evidence of her 2004 misdemeanor conduct, we cannot reasonably conclude that the resulting impeachment would have changed the result, thus undermining our confidence in the verdict. (Cf. *People v. Martinez* (2002) 103 Cal.App.4th 1071 [prosecution's failure to disclose witness's pending criminal charges undermined confidence in verdict; the evidence not produced would have rendered witness's testimony biased and unconvincing, cast doubt on other witness's testimony, and rendered the witness a probable suspect in crime].) There was neither *Brady* error requiring reversal, nor prejudicial error under California law.

3. Motion for New Trial

Appellant contends that the trial court should have granted his motion for a new trial. We will not interfere with a trial court's decision on a motion for new trial based on newly discovered evidence unless there is a clear abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004-1005.) "To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial. [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 473.) For the reasons discussed above, we conclude the inclusion of the impeachment evidence would not have made a different result probable on retrial. (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) The trial court did not abuse its discretion in denying appellant's motion for a new trial.

II. Sufficient Evidence Supported the Great Bodily Injury Finding

Appellant contends there was insufficient evidence to support a true finding that he inflicted great bodily injury upon Holland. We disagree.

Great bodily injury is a "significant or substantial physical injury." (§ 12022.7, subd. (f); *People v. Escobar* (1992) 3 Cal.4th 740, 746 (*Escobar*).) " ' " 'Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great

bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.' " ' [Citation.]" (*People v. Mendias* (1993) 17 Cal.App.4th 195, 205, citing *Escobar, supra*, at p. 750.)

Holland testified that as a result of appellant's blows, her face was swollen, her palm, knees, and the toes on her left foot were torn open and bloodied, and her vision was impaired. For months Holland suffered pain and body aches. Officer Fisher confirmed that Holland had fresh bloody abrasions on her hands, elbows, and knees, and a lump on her head. When Holland went to the hospital two days after the incident, the physician noted she had two black eyes, abrasions, and decreased range of motion in her knee. Holland also complained of aches and dizziness. Some of Holland's scars were still visible at trial. She reported her cheek was still numb from the incident, and she suffered occasionally hazy vision. The jury saw photographs of Holland's injuries taken immediately after the incident. This evidence was more than sufficient to support a great bodily injury enhancement.

Appellant asserts Holland's refusal to seek medical attention immediately after the incident indicated her injuries were not significant or substantial. While this was a factor the jury was free to consider, it was not dispositive. (See *People v. Cross* (2008) 45 Cal.4th 58, 65 (*Cross*) [courts have not held medical complications are required to support a finding of great bodily injury]; *People v. Lopez* (1986) 176 Cal.App.3d 460, 463, fn. 5.) The evidence of numerous abrasions, bruising, and a blow to the face that caused headaches, numbness, and blurred vision, was sufficient to allow the jury to conclude that Holland suffered significant and substantial injuries. (*Escobar, supra*, 3 Cal.4th at pp. 750, 752 [great bodily injury where victim had bruises and abrasions on her legs, knees, and elbows, injury to her neck, and vaginal soreness that impaired her ability to walk]; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042 [abrasions, lacerations, and bruising may constitute great bodily injury].) " ' "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." [Citations.]' Where to draw that line is for the jury to decide." (*Cross, supra*, at p. 64.)

We conclude there was sufficient evidence for the jury to find appellant inflicted great bodily injury upon Holland.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.